IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

BAYVIEW LOAN SERVICING, LLC,	:	APPEAL NO. C-090270 TRIAL NO. A-0801709
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
SOLOMON COOK,	:	
and	:	
DOROTHEA COOK,	:	
Defendants-Appellants,	:	
and	:	
JOHN M. SHAFER AND PATRICK A. TEPE, A PARTNERSHIP, ET AL.,	:	
Defendants.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Defendant-appellants, Solomon and Dorothea Cook, appeal a decision of the Hamilton County Court of Common Pleas granting summary judgment in favor of plaintiff-appellee, Bayview Loan Servicing, LLC ("Bayview"). We find no merit in the Cooks' two assignments of error, and we affirm the trial court's judgment.

The record shows that Solomon Cook executed two promissory notes related to the purchase of an apartment building to Silver Hill Financial, LLC ("Silver Hill"), payable in the sums of $1.26 million and $157,500. The notes were secured with mortgages executed

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

by the Cooks on the property and various security agreements. Silver Hill subsequently assigned the notes and security interests to Bayview.

Cook defaulted on the loans, and Bayview exercised its right to declare the loans immediately due and payable. It filed suit against the Cooks to collect the amount due on the notes. Subsequently, it filed a motion for summary judgment.

In response, the Cooks claimed economic distress and fraudulent inducement. They contended that they were inexperienced in those types of complicated transactions. In his affidavit, Solomon Cook stated that the details of the purchase were arranged by Silver Hill's owner and another person who had previously sought to purchase the property. He went on to state, "I did not think I was in a position to make the purchase of the 72 Unit apartment building. Nevertheless, the deal seemed to force its way forward. * * * The note and mortgage were not shown to me prior to the closing. My reluctance to go through with the deal was met by threats by Silver Hill's agents to sue us for the costs of processing the loan and legal fees."

He added, "I was not given the closing documents to review before the closing, and I was not intending to go through with the loan. The initial terms of the loan as proposed were different than those evidenced by the notes which I was told to sign. Closing personnel suggested to me, once I appeared for the closing, that I had no choice but to sign the notes and mortgages. I signed the instruments under duress."

A magistrate recommended that the court grant Bayview's motion and enter judgment in its favor. The Cooks objected to the magistrate's decision. The trial court overruled the objections and adopted the magistrate's decision. It granted judgment against the Cooks on both notes and awarded damages consisting of the principal due on the notes, interest and costs. This appeal followed.

In their first assignment of error, the Cooks contend that the trial court erred in granting summary judgment in favor of Bayview. They argue that issues of fact existed

that related to economic duress and fraudulent inducement. This assignment of error is not well taken.

On a motion for summary judgment, the moving party has the burden to submit evidentiary materials showing that no issues of fact exist for trial and that it is entitled to judgment as a matter of law.[2] In this case, Bayview met its burden by presenting evidentiary material showing that the Cooks had defaulted on the notes. Once it met its burden, the Cooks, as the nonmoving parties, had the burden to set forth specific facts showing that genuine issues of fact existed for trial.[3]

A claim of fraudulent inducement arises when a party is induced to enter into an agreement through fraud or misrepresentation. The fraud relates not to the nature of the contract, but to the facts inducing its execution.[4] The party claiming fraud in the inducement must show that the other party made a knowing, material misrepresentation with the intent of inducing reliance, and that he or she relied upon that misrepresentation to his or her detriment.[5]

Nothing in Solomon Cook's affidavit shows a genuine issue of fact on these elements. He did not specify a particular misrepresentation; he only asserted that he did not see the documents before closing and that the initial terms of the loan were different from those in the note he signed. These averments show that he recognized that the terms were different than Silver Hill had represented to him, and he could not then claim that he had relied on them.

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[2] *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 1996-Ohio-107, 662 N.E.2d 264; *Stinespring v. Natorp Garden Stores, Inc.* (1998), 127 Ohio App.3d 213, 216, 711 N.E.2d 1104.
[3] *Dresher*, supra, at 293; *Stinespring*, supra, at 216; *Internatl. Assn. of Bridge, Structural, Ornamental & Reinforcing Iron Workers, Local 372, v. Sunesis Constr. Co.*, 183 Ohio App.3d 438, 2009-Ohio-3729, 917 N.E.2d 343, ¶17.
[4] *ABM Farms, Inc. v. Woods*, 81 Ohio St.3d 498, 502, 1998-Ohio-612, 692 N.E.2d 574.
[5] Id.; *Information Leasing Corp. v. Chambers*, 152 Ohio App.3d 715, 2003-Ohio-2670, 789 N.E.2d 1155, ¶84.

Bayview points out that even if the proposed terms of the loans were different from the final terms in the written agreement, the parole evidence rule applied. The rule does not prohibit a party from introducing extrinsic evidence proving fraudulent inducement. But a party cannot make a case for fraudulent inducement by simply alleging that a statement or agreement made prior to the contract is different from that which appears in the written contract. To the contrary, attempts to prove those types of contradictory assertions are what the parole evidence rule prohibits.[6] The Cooks contend that the terms of the deal were different than the terms in the loan documents, and the parole evidence rule would have prohibited them from presenting extrinsic evidence to prove it.

To avoid a contract on the basis of economic duress, a party must prove coercion by the other party to the contract. That party must demonstrate more than that he or she assented because of difficult circumstances that were not the fault of the other party.[7] A court may find duress when the threats overcome the will of a person, removing his capacity to act for himself and causing him to perform an act that he is not legally bound to perform.[8] The coercion must deprive the victim of "his unfettered will."[9] The threat of civil litigation "to protect that which one believes to be his legal right is not sufficient to constitute duress."[10]

The Cooks contend that Solomon Cook signed the notes because Silver Hill threatened to sue him for processing costs and legal fees. This threat did not rise to the level of destroying his free will, particularly given that processing costs and legal fees, in all likelihood, would not have come close to the amount of the loan.

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[6] *Galmish v. Cicchini*, 90 Ohio St.3d 22, 28-29, 2000-Ohio-7, 734 N.E.2d 782; *Citicasters v. Bricker & Eckler, LLP*, 149 Ohio App.3d 705, 2002-Ohio-5814, 778 N.E.2d 663, ¶7-8 and ¶17-19.
[7] *Blodgett v. Blodgett* (1990), 49 Ohio St.3d 243, 551 N.E.2d 1249, syllabus.
[8] *Blodgett*, supra, at 246; *Mack v. Thompson* (Aug. 31, 1994), 1st Dist. No. C-930359.
[9] *Blodgett*, supra, at 246; *Atlantic Veneer Corp. v. Robbins*, 4th Dist. No. 03CA719, 2004-Ohio-3710, ¶9.
[10] *Hotel Sheraton Gibson, Inc. v. Morris* (July 11, 1979), 1st Dist. No. C-780299; *Gallagher v. Lederer* (1949), 86 Ohio App. 181, 183-184, 90 N.E.2d 412.

We find no issues of material fact. Construing the evidence most strongly in the Cooks' favor, we hold that reasonable minds can come to but one conclusion – that the Cooks were liable on the notes. Consequently, Bayview was entitled to judgment as a matter of law, and trial court did not err in granting its motion for summary judgment.[11] We overrule the Cooks' first assignment of error.

In their second assignment of error, the Cooks contend that the trial court erred in determining the amount of damages. In support of its motion for summary judgment, Bayview presented the affidavit of John D'Errico, its assistant vice president, which set forth the amount Bayview claimed that it was owed. The trial court ultimately entered final judgment in those amounts.

The Cooks never raised the issue of the amount of damages in their memorandum in opposition to Bayview's motion for summary judgment or in their objections to the magistrate's decision, as Civ.R. 53(D)(3) required. Consequently, they waived any error but plain error.[12] Even if Bayview was required, as the Cooks contend, to support its claim for damages with some sort of business record,[13] we cannot hold that the trial court's acceptance of the amount of damages as set forth in D'Errico's uncontradicted affidavit rose to the level of plain error. "The plain error doctrine will be used in civil cases only under exceptional circumstances to prevent a manifest miscarriage of justice."[14]

The Cooks further argue that the court did not have jurisdiction to determine damages. The record shows that the court had previously appointed a receiver to operate the property and the Cooks had appealed that judgment to this court. We affirmed the court's decision by judgment entry.[15]

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[11] *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Stinespring*, supra, at 215.
[12] Civ.R. 53(D)(3); *Bamba v. Derkson*, 12th Dist. No. C2006-CA-125, 2007-Ohio-5192, ¶11-12.
[13] See *Great Seneca Financial v. Felty*, 170 Ohio App.3d 737, 2006-Ohio-6618, 869 N.E.2d 30.
[14] *Cleveland Electric Illuminating Co. v. Astorhorst Land Co.* (1985), 18 Ohio St.3d 268, 275, 480 N.E.2d 794; *Hale v. Steri-Tec Serv., Inc.*, 11th Dist. No. 2008-G-2876, 2009-Ohio-3935, ¶16.
[15] *Bayview Loan Servicing, LLC. v. Cook* (Feb. 18, 2009), 1st Dist. No. C-080532.

They argued below that the court did not have jurisdiction to rule on the motion for summary judgment because that appeal was before this court. Generally, the trial court loses jurisdiction to take action in case after an appeal has been filed except to take action in aid of the appeal. But the trial court does retain jurisdiction over issues "not inconsistent with that of the appellate court to review, affirm, modify or reverse the appealed judgment[.]"[16]

We find no merit in this argument. Even though the parties filed numerous documents after the Cooks had filed their notice of appeal from the court's decision appointing the receiver, the trial court did not actually issue its decision granting summary judgment to Bayview and determining damages until after this court had journalized its entry. Therefore, the trial court did not take any action inconsistent with the appeal.

The Cooks also assert a new argument in this appeal. They contend that the receiver was a necessary party to the action and that the trial court could not have determined damages without the receiver. They did not raise that issue below, and they, therefore, waived it.[17] Further, it does not rise to the level of plain error. They cite no authority for the proposition that a receiver must or even could be a party to a motion for summary judgment in a foreclosure action. They are simply attempting to reargue the issue of whether the appointment of a receiver was proper. This court held that the appointment was proper and that decision is now the law of the case.[18]

Finally, the Cooks argue that the receiver mismanaged the property, causing some of Bayview's damages. While they raised this issue at various times in the trial court, they did not specifically object to the amount of damages recommended in the magistrate's decision as required by Civ.R. 53(D), and they presented no evidence showing that the

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[16] *State ex rel. Special Prosecutors v. Judges, Court of Common Pleas* (1978), 55 Ohio St.2d 94, 97, 378 N.E.2d 162; *State v. Brown*, 1st Dist. No. C-081026, 2009-Ohio-5347, ¶4.
[17] *Davis v. Allen*, 1st Dist. Nos. C-010165, C-010202 and C-010260, 2002-Ohio-193.
[18] See *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 4, 462 N.E.2d 410; *Cleary v. Cincinnati*, 1st Dist. No. C-060410, 2007-Ohio-2797, ¶24.

receiver mismanaged the property to their detriment or raising any issue of fact regarding damages. Consequently, the trial court could properly have determined the amount of damages from D'Errico's affidavit. We overrule the Cooks' second assignment of error and affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., DINKELACKER and **MALLORY, JJ.**

To the Clerk:

Enter upon the Journal of the Court on May 26, 2010

per order of the Court _____.

Presiding Judge